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CHARLES ELMORE CROPLEY

In The

SUPREME COURT OF THE UNITED STATES

October Term, A.D. 1942

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No. 577

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CHARLES M. THOMSON, Trustee of the Property of CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS (Herman E. Stoll),

Respondent

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ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, AND SUPPORTING BRIEF

MARSHALL SOLBERG

GERALD T. WILEY,

Counsel for Respondent.

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

Herman E. Stoll, respondent to the petition for writ of certiorari herein, respectfully shows to this Honorable Court:

### THE MATTER INVOLVED

We cannot agree with Counsel's statement of the matter involved. Assuming that statement to be true in all other respects, the position of the Supreme Court of Illinois, when deciding this case, has not been correctly stated and is not at variance with applicable decisions of this Court. Counsel quotes the Illinois Court as holding that "the Employers' Liability Act is applicable only in cases where the employer is at the very time of his injury performing a duty

in furtherance of interstate commerce; that any other interpretation of the language of the amendment of August 11, 1939, would result in such amendment being 'beyond the powers of Congress'."

Actually, what the Court said was that "the amendment in so far as it attempts to include the employees of interstate carriers at all times, regardless of whether or not their immediate employment is in interstate commerce or affects such commerce, is beyond the powers of Congress. On the other hand, the provisions of the 1939 amendment which broaden the application of the act to include those employees whose employment 'in any way directly or closely and substantially' affects interstate commerce, are within the powers of Congress and constitute a valid enactment."

## ADDITIONAL STATEMENT OF THE CASE

Counsel for Petitioner have with fair accuracy stated the portions of the record involved in the present phase of this matter. However, because the injuries of the Respondent Stoll were not (as indeed they could not be) disputed, his horrible and permanent mutilation is not set forth.

## SUMMARY OF ARGUMENT

I RESPONDENT WAS NOT WITHIN THE 1939 AMENDMENT OF THE FEDERAL EMPLOYERS' LIABILITY ACT.

Much of Petitioners' argument and many of his statements as to the powers of Congress to regulate interstate commerce

may be admitted without giving cause to this Court to review the four decisions so far rendered in Respondent's favor. Reduced to its proper proportion, this case presents only one factual question: Was Respondent "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce, or shall, in any way directly or closely and substantially, affect such commerce as above set forth...?"

Respondent was a patrolman. He worked only in Chicago. He was empowered to make arrests, and it was in the course of his making such an arrest that he was injured.

For what was he making the arrest? For a violation of a Federal Statute? The man whom he was taking into custody was trespassing--trespassing on the premises of his employer, and thus violating a statute, not of the United States, but of the State, and probably a city ordinance as well.

Counsel surely cannot argue that such a trespass would constitute only an offense against interstate commerce. That argument, carried to its logical conclusion, would imply that Congress had the power to declare that all offenses against the properties and rights of way of interstate carriers should be regarded as Federal crimes only, to the exclusion of State criminal laws.

His duties were the protection of property. They were preventive only; nowhere is there any evidence to show that he was engaged at any time in any duties pertaining to interstate commerce, or in furtherance of interstate commerce.

Stoll has been described in the evidence and in counsel's petition as a 'patrolman.' It was shown that he walked a beat within a small area in the City of Chicago (Tr. 8). He had nothing to do with the operation of trains, the forwarding of freight or the carrying of passengers. He merely protected the property of his employer against thefts and trespasses--violations of local laws and ordinances.

Counsel seek to extend the operation of the Federal act to the point where every employee of a railroad which runs between two states would be subject to that act. To do so would exclude exertion of an existing and satisfactory State law, bringing about an effect never intended by Congress. It was held in Boston and Me. Railroad vs. Armburg, 285 U. S. 234, that the Federal Employers' Liability Act does not exclude exertion of State power over employees of interstate carriers while engaged in services not involving interstate commerce. Such employees are controlled by the State law.

That Stoll's duties were of a purely local nature is shown by the evidence. Recounting the occurrence in which he received his horrible injuries, he testified: 'I approached him as a police officer and showed him my badge...I showed him my star, and said 'Police Officer'...I told him to come along as I wanted to lock him up.' (Tr. 6-7) 'I worked for the Chicago and North Western Railway as a patrolman for about three years and this was my regular assignment. My duties as a patrolman were to protect the right of way from thieves, hitchhikers, trespassers, and so forth, inspect

cars in the yards and if we find a seal missing we put on our police seal and make a report to the office." (Tr. 8)

And Charles J. Slater, special agent for the railroad who employed Stoll testified: "We do police work in general and if there is a robbery we try to apprehend the robbers." (Tr. 28)

Thus we have a respondent whose work was purely local in character and whose duties cannot be said to be the furtherance of interstate commerce or directly or closely and substantially affecting such commerce. It was that which the Supreme Court of Illinois and the inferior courts and tribunals have held, and there is nothing in that finding which is not in accord with applicable decisions of this Court.

It will be noted that in the list of cases holding policemen, watchmen or inspectors at railroad yards where both interstate and intrastate commerce is being carried on to be in interstate commerce, no Federal cases are cited.

Counsel lay great stress in their petition upon the views expressed by Congress in adopting the legislation, and quote from the report of the Committee on the Judiciary of the United States Senate. Among the objects set forth there is the elimination of the possibility of a claimant finding, too late, that he had sued in the wrong court, during the acquirement of this information and being barred from recovery under any other law.

The reversing of this case would do just that. Counsel

is attempting, under the guise of seeking a decision on the amendment to the Act, to prevent Stoll from recovering anything whatever for his very severe injuries and for the long period of convalescence and unemployment which still pertain. Had Stoll brought his action under the Federal Employers' Liability Act, would not counsel have maintained that he had chosen the wrong forum, and that he should have brought his action before the Industrial Commission of the State? We believe they would.

Should Stoll be in this case denied his right to recover, his only recourse is denied him. Should he be required to proceed under the Federal Employers' Liability Act, which he probably could not do because of the length of time since his injury, he would be required to prove negligence on the part of his employer. And Stoll, although engaged in a dangerous calling, obviously could not prove that the railroad was negligent in permitting or making it possible for three ruffians to set upon him and beat him nearly to death.

Even assuming, which we do not, that the law would be benefited by some clarification, this is not a proper case in which to consider the question.

Nor would a determination by this Court of the question here presented clarify for all time the application of the Amendment to the Act. It would settle only this case, for there remains in every other law suit a different set of facts, in each of which those facts must be weighed in the light of the amendment. This court has acknowledged that problem in the case of Industrial Accident Commission of the State of California

vs. Davis, 259 U. S. 182. In that case Davis was injured while working in the repair shops of the railway company on an engine that had been exclusively employed in interstate commerce, which engine after being repaired was returned to interstate service. The California District Court of Appeals held that the sole question presented was whether the engine at the time of the accident was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act and concluded that the employee's work was "so intimately connected with interstate commerce as practically to be a part of it and, therefore, the Industrial Commission had no Jurisdiction." The Supreme Court of the United States reversed the California courts. (Ind. Acc. Com. vs. Davis, supra.)

In considering the difficulties presented by such a case, the Court said, "The Federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement,--indeed, are necessary to it; but so are all attached to the railroad company,--official, clerical, or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees."

But if this Court is to consider the question of the constitutionality and application of the 1939 amendment, we can do

no better in stating Respondent's position than to follow the reasoning and language of the Supreme Court of Illinois. After reviewing the history of the legislation on this subject and quoting the amendment the Court says:

> "Plaintiff in error contends that the effect of this amendment was to extend the act to include all employees of an interstate carrier, under the terms of the act, so long as any part of their duties is associated with interstate commerce. With this interpretation we cannot agree. Taken literally, it would mean that Congress, by arbitrarily defining any act as interstate commerce, could bring that act within the scope of Federal regulatory power. Congress cannot, under the guise of regulation of interstate commerce, exercise powers not intrusted to it by the constitution. United States v. Ohio Oil Co., 234 U.S. 548, 58 L. ed 1459; Carter v. Carter Coal Co., 298 U.S. 238, 56 Sup. Ct. 855.
>
> In recent years the powers of Congress to regulate industry, for the purpose of furthering interstate commerce, have been greatly extended by judicial construction. Although Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat 1, 196, 6 L. ed. 23, 70, defined the authority of Congress over interstate commerce as "plenary," and subject to "no limitations other than are prescribed in the constitution," nevertheless for many years it was generally conceded that the exercise of that authority was limited to the control of acts which, in themselves, actually constituted a part of interstate commerce.
>
> Gradually, as the methods of business and commerce changed, it was recognized that many transactions which do not, in themselves, reach across State lines, are nevertheless so closely and inseparably interwoven with interstate operations as to substantially affect such commerce. From this, to the recognition of the power of Congress to regulate those businesses which substantially affect interstate commerce, was but a step, and the United States Supreme Court has taken that step. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615; Board of Trade v. Olsen, 262 U. S. 1, 43 S. Ct. 470, 67 L. ed. 839.
>
> The extension of Federal control has not, however, destroyed the constitutional limitations on the power of Congress. Notwithstanding the modern trend has been to give to all constitutional limitations a flexibility which renders restrictions practically innocuous, the constitution still exists. It is binding on this court

as well as on the Congress of the United States. Congress is still powerless to regulate matters which are wholly intrastate. As said in the Jones & Laughlin case, supra, 'The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

What, then, is the effect of the 1939 amendment? It seems clear that until Howard v. Illinois Central Railroad Co. supra, and the Jones & Laughlin case, supra, are overruled, the amendment in so far as it attempts to include the employees of interstate carriers at all times, regardless of whether or not their immediate employment is in interstate commerce or affects such commerce, is beyond the powers of Congress. On the other hand, the provisions of the 1939 amendment which broaden the application of the act to include those employees whose employment 'in any way directly or closely and substantially' affects interstate commerce, are within the powers of Congress and constitute a valid enactment.

Viewed from this basis, the only effect of the 1939 amendment is to change the test which must be applied to determine whether or not the Federal Employers' Liability act is applicable. Prior to that amendment, the test has been whether the employee, at the time of the accident, was engaged in interstate commerce, or in work so closely related to it as to become a part of it. (Thomson v. Industrial Com., 372 Ill. 288.) Under the amendment, the test must be whether the activity in which the employee is engaged at the time of the accident, directly or closely and substantially affects interstate commerce.'

We think a further quotation from the Jones and Laughlin case is apropos:

'Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control, A.L.A. Schechter Poultry Corp. v. U. S., supra. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized

government. Id. The question is necessarily one of degree."

Analogous cases have been decided by the Supreme Court of Alabama. In Southern Railway Company vs. Brown, 134 So. 643, it was held by the Supreme Court of Alabama that proceedings to recover compensation for the death of a railroad policeman, shot, by a person arrested, while patroling for brass thieves, bore no direct causal relation to interstate commerce, and the Court also stated that the cars which had been engaged in interstate commerce but had been placed for unloading were not thereafter as affecting the railroad policeman's acts engaged in interstate commerce. The Railroad, in the instant case, admitted that some of the coal in question in this case remained in the cars that had been placed on the sidetrack or switchtrack of the consignee which had its coal yards immediately adjacent to the railroad tracks.

In Sou. Ry vs. Varnell, 131 So. 903, the Supreme Court of Alabama held that a yard policeman, who arrested two hobos on a train which included both intrastate and interstate cars, and thereafter while searching these hobos at the station some distance off, still on the railroad premises, was shot by one of these hobos and subsequently died, that there was no showing that the policeman's doings were connected with or contributed to the operation of trains, but were merely that of a local policeman and in no way connected with making up or operating trains, or of doing work by giving signals, or aiding directly or indirectly in the formation or movement of the same. Therefore, the Court

held that the proceedings under the Workmen's Compensation Act were properly laid, and that the Federal Employers' Liability Act did not apply.

## CONCLUSION

We respectfully submit that this is not a proper case for the granting of a writ of Certiorari and that should such a writ be granted, the logic and reasoning of the Supreme Court of Illinois should be followed by this Honorable Court.

Respectfully submitted,

Marshall Solberg

Gerald T. Wiley
Counsel for Respondent

Paul E. Johnson
Of Counsel

(19)

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*Respondent.*

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## REPLY BRIEF.

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## REPLY BRIEF.

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Since our petition for writ of certiorari was filed in this Court there has been published a very recent decision of the Seventh Circuit Court of Appeals rendered November 23, 1942. This is the case of *Edwards* v. *Baltimore & O. R. Co.*, 131 Fed. (2d) 366, where a mechanic's helper was injured while repairing an automatic stoker of a locomotive that had been used in interstate commerce but at the time of the accident was not in actual use. It was to be returned to service only after the

stoker was repaired. A recovery was had in the trial court and on appeal the judgment for plaintiff was affirmed. It was held that plaintiff while engaged in repairing and fitting the engine for further commerce was furthering and substantially affecting interstate commerce within the meaning of the 1939 amendment. In discussing the effect of that amendment the court said:

> "The statute, broadened by the 1939 amendment, now reads: 'Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.'
>
> Despite any question as to whether plaintiff might have recovered under the original act (see New York Central Ry. v. Marcome, 281 U. S. 345, 50 S. Ct. 294, 74 L. Ed. 892), it is clear that he is within the scope of the amendment. Under the original statute experience demonstrated continued difficulty in ascertaining when the work of an employee was part of interstate commerce. The amendment, much wider in scope, was inspired by a desire to avoid such confusion. Congress' intent to include any employee who performs services which in any way further or affect interstate commerce is clear. Ermin v. Pennsylvania Ry., D. C. N. Y., 36 F. Supp. 936; Southern Pac. Co. v. Ind. Acc. Comm., Cal. App. 113 P. 2d 768, 770, affirmed by California Supreme Court in 19 Cal. 2d 883, 120 P. 2d 888; Piggue v. Baldwin, 154 Kan. 708, 121 P. 183; Louisville & N. Co. v. Potts, Tenn. Sup., 158 S. W. 2d 729)."

It will thus be seen that in the case of injuries of employees of interstate carriers in the state of Illinois the Supreme Court of Illinois (case at bar) holds one

way and the Federal Circuit Court of Appeals of this Circuit (*Edwards* case) holds just the opposite. This emphasizes what was said by us on page 27 of our petition for certiorari to the effect that the rights of an injured employee will depend upon whether he goes into one court or another, although there should be uniformity of decision throughout the Nation in applying the Federal Employers' Liability Act.

Respondent's answer to our petition for writ of certionari is based on the following propositions:

**I.**

He says that out of sympathy respondent should be allowed to retain the benefits of the award because

(a) He has received "horrible and permanent mutilation" (p. 2 of answer).

(b) If respondent cannot recover on the basis of the Illinois Workmen's Compensation Act he must proceed under the Federal Employers' Liability Act, "which he probably could not do because of the length of time since his injury and because he would be required to prove negligence on the part of his employer" (p. 6 of answer).

**II.**

He says that "Nowhere is there any evidence to show that respondent was engaged *at any time in any duties* pertaining to interstate commerce, or in furtherance of interstate commerce" (p. 3 of answer).

**III.**

He says that one the grounds stated by the Supreme Court of Illinois in the case at bar, if effect is given to the clear and unambiguous wording of the 1939 amendment the act is beyond the scope of the powers of Congress.

We shall take these points up in the order set forth above.

I.

(a) A studied effort is made on the part of counsel for respondent to convince this Court that the case at bar is not a proper one for this Court to review because respondent has "horrible and permanent mutilation," (p. 2 of answer) and because there still "pertains a long period of convalescence and unemployment" (Ans. p. 6). Obviously the seriousness of respondent's injuries have no bearing on existence of liability. As a matter of fact, however, respondent's claim of permanent disability has no foundation in the record. As shown by the opinion of the Supreme Court of Illinois (R. 57), "respondent's injuries, while serious, apparently resulted in no permanent disability. There is no dispute as to the above facts or as to the nature and extent of the injuries." The finding by the arbitrator was that respondent's injuries resulted in *temporary* total disability. Compensation was allowed him for a period of 43-4/7 weeks. On review the period was increased to 58 weeks and this award was confirmed by the Circuit Court of Cook County, Illinois. No claim is made that the award of 58 weeks' disability is inadequate.

(b) In a further effort to have this case tried on sympathy rather than on the law the respondent on page 6 of his answer says that "should he be required to proceed under the Federal Employers' Liability Act" he probably could not do so because of the length of time since his injury, and that he would be required to prove negligence on the part of his employer to recover under the Federal Act.

Respondent thus intimates that the statute of limitations has now run on a suit under the Federal Employ-

ers' Liability Act. This is not true. The accident occurred on March 11, 1940, and the statute of limitations will not run until March 11, 1943 (Section 56, U. S. Code, Title 45).

As to respondent's contention that he should be allowed to retain the award because he could not prove negligence on the part of petitioner in an action under the Federal Employers' Liability Act, we can only point out that Congress in the exercise of its powers saw fit to bring respondent under the Federal Employers' Liability Act and the court has no power to vitiate an act of Congress because of hardship in a particular case. Congress felt that on the whole greater benefits would accrue to the employees of interstate carriers by the passage of the act than existed before that time. The mere fact that this case is one instance where the benefits may not be as great as before the passage of the Act cannot destroy the validity of the Act.

## II.

At the bottom of page 3 of the answer respondent states that his duties were "preventive only" and that "nowhere is there any evidence to show that respondent was engaged *at any time in any duties* pertaining to interstate commerce." On page 4 counsel for respondent also say that Stoll "merely protected the property of his employer against thefts and trespasses—violations of local laws and ordinances." These are misstatements. The duties of respondent are stated by the Supreme Court of Illinois in its opinion at page 56 of the record. They were not only to act as patrolman and as such to "patrol the railroad right of way in his district, look out for fires; eject or arrest trespassers, examine and test seals on cars, (both interstate and intrastate) and protect the cars and their contents from thieves and